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Snyder v. Phelps

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SNYDER V. PHELPS

“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market . . .”¹ Since Justice Holmes penned these words in 1919, his “marketplace of ideas” analogy has supported the right to free speech and ultimately has become foundational to America’s Free Speech Clause jurisprudence.² Juxtaposed against the right to speak freely, however, is the right to protection from harm that others’ “marketplace” expressions can cause.³ Although the United States Supreme Court has validated such protection by recognizing common law torts for speech-caused harm, allowing recovery of damages without unduly encroaching on First Amendment rights requires careful judicial balancing of parties’ interests.⁴

Last year, *Snyder v. Phelps*⁵ required the Fourth Circuit to determine an appropriate balance between these competing interests when the appellants asserted that a jury’s decision finding them liable for intrusion upon seclusion, intentional infliction of emotional distress, and civil conspiracy violated their First Amendment right to publicly proclaim “God’s hatred of America for its tolerance of homosexuality.”⁶ The Fourth Circuit held that in spite of the “distasteful and repugnant” nature of the appellants’ speech, the First Amendment protected the speech and “the district court erred in declining to award judgment as a matter of law.”⁷

On March 10, 2006, Fred W. Phelps, Sr., Shirley L. Phelps-Roper, Rebekah A. Phelps-Davis, and four of Phelps’s grandchildren picketed the funeral of Marine Lance Corporal Matthew A. Snyder at St. John’s Catholic Church in Westminster, Maryland.⁸ Fred W. Phelps is the founder and sole pastor of Westboro Baptist Church in Topeka, Kansas, where “his children, grandchildren, [and] in-laws” comprise fifty of the “approximately sixty or seventy members.”⁹ “[M]embers of [Phelps’s] church practice a fire and brimstone fundamentalist religious faith” and believe “that God hates homosexuality and hates and

1. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

2. *See* *Virginia v. Hicks*, 539 U.S. 113, 119 (2003); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50–51 (1988) (citing *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)); *FCC v. Pacifica Found.*, 438 U.S. 726, 745–46 (1978); *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975); *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390 (1969) (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964); *Associated Press v. United States*, 326 U.S. 1, 20 (1945); *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)); ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* § 11.1.2, at 927–29 (3d ed. 2006).

3. *See, e.g., Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) (recognizing “[t]he legitimate state interest underlying the law of libel”).

4. *See Gertz*, 418 U.S. at 341; *N.Y. Times Co.*, 376 U.S. at 279–83.

5. 580 F.3d 206 (4th Cir. 2009), *cert. granted*, 78 U.S.L.W. 3521 (U.S. Mar. 8, 2010) (No. 09-751).

6. *See id.* at 210–12.

7. *Id.* at 226.

8. *Id.* at 211–12 (quoting *Snyder v. Phelps*, 533 F. Supp. 2d 567, 571 (D. Md. 2008), *rev’d*, 580 F.3d 206 (4th Cir. 2009)).

9. *Id.* at 211 (quoting 533 F. Supp. 2d at 571).

punishes America for its tolerance of homosexuality, particularly in the United States military.”¹⁰ Members of the church assert their beliefs by picketing at funerals and by publishing their views on the Web site www.godhatesfags.com.¹¹

Signs that Phelps and his family carried at Snyder’s funeral “expressed general messages such as ‘God Hates the USA,’ ‘America is doomed,’ ‘Pope in hell,’ and ‘Fag troops.’”¹² Other signs expressed specific messages: “‘You’re going to hell,’ ‘God hates you,’ ‘Semper fi fags,’ and ‘Thank God for dead soldiers.’”¹³ At the funeral, Phelps and his family neither violated any local ordinances or police directions regarding the distance of their protests from the church nor directly confronted any members of the Snyder family.¹⁴ Matthew Snyder’s father first saw the Phelps’ signs when he viewed television footage of the funeral protest.¹⁵ “After returning to Kansas, [Shirley L.] Phelps-Roper published an ‘epic’” titled “‘The Burden of Marine Lance Cpl. Matthew Snyder’” on www.godhatesfags.com.¹⁶ She included a photograph of the Maryland protest immediately below the epic’s title and subtitled the epic, “The Visit of Westboro Baptist Church to Help the Inhabitants of Maryland Connect the Dots! This Epic Adventure Took Place on Friday, March 10, 2006.”¹⁷ The epic declared “that Albert Snyder and his ex-wife ‘taught Matthew to defy his creator,’ ‘raised him for the devil,’ and ‘taught him that God was a liar.’”¹⁸

In 2006, Albert Snyder brought suit against Phelps, Westboro Baptist Church, Phelps-Roper, and Phelps-Davis, alleging “defamation, intrusion upon seclusion, publicity given to private life, [intentional infliction of emotional distress], and civil conspiracy.”¹⁹ In October 2007, “the district court granted summary judgment to the [d]efendants on . . . [the] defamation and publicity given to private life” claims but denied summary judgment on the other three claims.²⁰ The court reasoned that the First Amendment may have protected the general viewpoint signs such as “America Is Doomed” and “God Hates America,” but the Web site epic and signs such as “Thank God for Dead Soldiers,” “Semper Fi Fags,” “You’re Going to Hell,” and “God Hates You,” created issues of fact for a jury’s determination because they expressed views

10. *Id.* (quoting 533 F. Supp. 2d at 571) (internal quotation marks omitted).

11. *Id.* (quoting 533 F. Supp. 2d at 571).

12. *Id.* at 212 (quoting 533 F. Supp. 2d at 572) (internal quotation marks omitted).

13. *Id.* (quoting 533 F. Supp. 2d at 572) (internal quotation marks omitted).

14. *Id.* (quoting 533 F. Supp. 2d at 571–72).

15. *Id.* (quoting 533 F. Supp. 2d at 572).

16. *Id.* (quoting 533 F. Supp. 2d at 572) (internal quotation marks omitted).

17. *Id.* at 224 (internal quotation marks omitted).

18. *Id.* at 212 (quoting 533 F. Supp. 2d at 572) (internal quotation marks omitted).

19. *Id.* Snyder brought suit against Phelps and Westboro Baptist Church on June 5, 2006. 533 F. Supp. 2d at 572. On February 23, 2007, he added Phelps-Roper and Phelps-Davis as defendants. *Id.*

20. *Snyder*, 580 F.3d at 213.

arguably specific to the Snyders.²¹ Thus, it instructed the jury to “determine whether the [d]efendants’ actions were directed specifically at the Snyder family” and if so, “whether [they] would be highly offensive to a reasonable person, whether they were extreme and outrageous and whether [those] actions were so offensive and shocking as to not be entitled to First Amendment protection.”²² On October 31, 2007, the jury found the defendants liable for intrusion upon seclusion, intentional infliction of emotional distress, and civil conspiracy; it awarded the plaintiff “\$2.9 million in compensatory damages and a total of \$8 million in punitive damages.”²³

“[T]he [d]efendants filed post-trial motions seeking judgment as a matter of law, judgment notwithstanding the verdict, reconsideration and rehearing, a new trial, relief from judgment, and relief of law and equity,” which the district court denied.²⁴ However, the court did grant the defendants’ motion for a remittitur and decreased the punitive damages award to a total of \$2.1 million.²⁵

In its post-trial opinion on the motion for judgment as a matter of law and judgment notwithstanding the verdict, the district court held that the Free Speech Clause of the First Amendment did not categorically protect the defendants’ actions, that it had properly submitted the plaintiff’s claims to the jury, and that sufficient evidence supported the jury’s findings that the defendants intentionally inflicted emotional distress on the plaintiff and invaded his privacy.²⁶ The court reasoned that the First Amendment did not categorically protect the defendants’ actions because “‘not all speech is of equal First Amendment importance’”²⁷ and “the First Amendment interest in protecting speech must be balanced against a state’s interest in protecting its residents from tortious injury.”²⁸

On appeal, the Fourth Circuit considered (1) whether the district court erred in allowing the jury to consider First Amendment legal issues and (2) whether the First Amendment protected the defendants’ Maryland protest and Web site epic.²⁹ Because the appeal involved First Amendment issues, the Fourth Circuit reviewed the district court’s conclusions de novo.³⁰

Regarding the first issue, the Fourth Circuit held that the district court erred in allowing the jury to determine whether the First Amendment protected the defendants’ speech.³¹ Citing the district court’s instructions to first determine if

21. *Id.* at 214 (citing 533 F. Supp. 2d at 578) (internal quotation marks omitted).

22. *Id.* at 215 (internal quotation marks omitted).

23. *Id.*

24. *Id.*

25. *Id.* at 215–16.

26. 533 F. Supp. 2d at 576–82.

27. *Id.* at 576 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985)).

28. *Id.* at 577 (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974)).

29. *Snyder*, 580 F.3d at 217. The defendants raised various other issues on appeal, but the court rejected them, determining that they were “plainly without merit.” *Id.* at 216.

30. *Id.* at 218.

31. *Id.* at 221.

the defendants' speech was "directed specifically at the Snyder family" and then determine if it was so "offensive and shocking as to not be entitled to First Amendment protection,"³² the Fourth Circuit held that the court "fatally erred" by permitting the jury to decide a legal issue—the scope of Free Speech Clause protection.³³ Although the district court's faulty submission of legal questions to the jury entitled the defendants to a vacation of judgment and a new trial, the Fourth Circuit noted that a new trial would be unnecessary if it determined that the First Amendment protected the defendants' speech as a matter of law.³⁴

Regarding the second issue, the Fourth Circuit held that the district court employed a faulty legal standard to evaluate the defendants' First Amendment claims³⁵ and that the Free Speech Clause protected the defendants' actions.³⁶ Criticizing the district court's nearly singular reliance on one Supreme Court decision,³⁷ the Fourth Circuit reviewed key decisions addressing the First Amendment's interaction with tort law and grounded its opinion in a line of cases ignored by the court below.³⁸

First, the Fourth Circuit established that state tort litigation between private parties is not immune from the constraints of the First Amendment.³⁹ Furthermore, although early precedent addressed the First Amendment's application specifically to the tort of defamation,⁴⁰ later precedent broadened its application to any damages sought for "reputational, mental, or emotional injury allegedly resulting from [a] defendant's speech."⁴¹ Next, the Fourth Circuit recognized that the First Amendment may protect defendants from defamation claims based on the plaintiff's status as a public or private figure.⁴² Finally, the

32. *Id.*

33. *Id.*

34. *Id.* at 221–22.

35. *Id.* at 222.

36. *Id.* at 226.

37. *Id.* at 222. The case was *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

38. *See Snyder*, 580 F.3d at 217–21.

39. *Id.* at 217.

40. *Id.* (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964)).

41. *Id.* at 218.

42. *Id.* (citing *Gertz*, 418 U.S. at 344–46; *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 164 (1967) (Warren, C.J., concurring); *N.Y. Times Co.*, 376 U.S. at 279–80). In *New York Times Co. v. Sullivan*, the Supreme Court held that the First Amendment prevents public officials from recovering damages against a defendant for alleged defamation unless the official can prove the defendant made its statements with "actual malice." 376 U.S. at 279–80. The Court reasoned that "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions" would deter protected speech. *Id.* at 279. Later, Chief Justice Warren argued that "public figures" must meet the actual malice standard. *Curtis Publ'g*, 388 U.S. at 164 (Warren, C.J., concurring). In *Gertz*, the Court held that each state could determine the appropriate level of proof necessary for a private figure to recover from a media defendant, provided it did not hold defendants strictly liable. 418 U.S. at 347. The Court reasoned that while the actual malice standard was appropriate for public officials because they had "voluntarily exposed themselves to increased risk" of inaccurate characterization and enjoyed substantial access to "channels of effective communication" through which to combat inaccuracies, such a standard was unrealistic for private figures, even if the alleged

court explored a line of decisions focusing on “the *type* of [allegedly harmful] speech” rather than on the plaintiff’s public or private figure status.⁴³ Specifically, in *Milkovich v. Lorain Journal Co.*,⁴⁴ the Supreme Court held that the First Amendment did not protect a media defendant against defamation allegations by a private figure when the defendant made statements that a reasonable person could conclude were “actual facts.”⁴⁵ In *Milkovich*, a wrestling coach brought a defamation action against a newspaper after it accused him of lying to a state athletics council.⁴⁶ The newspaper attempted to prevent recovery by asserting that *Gertz* implied categorical First Amendment protection for statements of opinion⁴⁷ and that the First Amendment barred it from liability because its statements were “opinion” rather than “fact.”⁴⁸ The Court rejected the newspaper’s categories of opinion and fact, however,⁴⁹ and instead asked “whether a reasonable factfinder could conclude that the statements . . . impl[ie]d an assertion” of actual fact about the plaintiff.⁵⁰ Finding the statements “sufficiently factual to be . . . proved true or false,”⁵¹ the Court reversed the decision of the Ohio Court of Appeals and remanded the case.⁵² The Court reasoned that by establishing a reasonableness standard instead of relying on the “artificial dichotomy between opinion and fact,” it would more adequately protect the “breathing space which [f]reedoms of expression require in order to survive.”⁵³ The Court specifically noted two types of constitutionally protected speech upon which its holding did not infringe: (1) media statements regarding

defamation involved a matter of public concern, because they had not exposed themselves to public scrutiny and likely did not possess substantial resources to “counteract false statements.” *Id.* at 344–45.

43. *Snyder*, 580 F.3d at 218–21.

44. 497 U.S. 1 (1990).

45. *See id.* at 20–21.

46. *Id.* at 3–6. The Court did not require the coach to prove the defendant acted with “actual malice” because the Ohio Supreme Court’s determination that the coach was not a public official remained the law of the case on that issue. *Id.* at 10–11 n.5.

47. *See id.* at 17–18 (“‘Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.’” (quoting *Gertz*, 418 U.S. at 339–40 (footnote omitted))).

48. *See Milkovich*, 497 U.S. at 17–18 (internal quotation marks omitted).

49. *Id.* at 18–19.

50. *Id.* at 21. Since *Milkovich*, the Fourth Circuit has applied its “actual facts” standard by examining the “‘verifiability of the statement,’” *Snyder v. Phelps*, 580 F.3d 206, 219 (4th Cir. 2009) (quoting *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1093 (4th Cir. 1993)), and “the context and general tenor of [the statement’s] message.” *Id.* The Seventh Circuit has also applied the standard by examining the objective verifiability of an allegedly defamatory statement. *See Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993) (“[I]f it is plain that the speaker is expressing a subjective view, an interpretation, a theory, conjecture, or surmise, rather than claiming to be in possession of objectively verifiable facts, the statement is not actionable.”).

51. *Milkovich*, 497 U.S. at 21.

52. *Id.* at 23.

53. *Id.* at 19 (alteration in original) (quoting *Phila. Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986)) (internal quotation marks omitted).

issues of public concern that lack a “provably false factual connotation” and (2) “rhetorical hyperbole” and “imaginative expression” traditionally present in America’s public discourse.⁵⁴

In *Snyder*, the Fourth Circuit used *Milkovich* as its primary analytic framework and held that a reasonable person could not conclude the defendants had stated actual facts about the plaintiff or his son.⁵⁵ First, the court examined a group of the defendants’ signs that it deemed similar in content: “‘America is Doomed,’ ‘God Hates the USA/Thank God for 9/11,’ ‘Pope in Hell,’ ‘Fag Troops,’ ‘Semper Fi Fags,’ ‘Thank God for Dead Soldiers,’ ‘Don’t Pray for the USA,’ ‘Thank God for IEDs,’ ‘Priests Rape Boys,’ and ‘God Hates Fags.’”⁵⁶ The court held that the First Amendment protected the signs because they dealt with issues of public concern and did not contain “objectively verifiable facts about [the plaintiff] or his son.”⁵⁷ The court reasoned that because the signs addressed “homosexuals in the military, the sex-abuse scandal within the Catholic Church, and the political and moral conduct of the United States and its citizens,” they involved “issues of social, political, or other interest to the community,” not issues of “purely private concern.”⁵⁸ Furthermore, the court reasoned that the signs did not assert objectively verifiable facts about the plaintiff or his son because they addressed other individuals or national or group concerns.⁵⁹ The court also held that even if a reader interpreted the signs as specific to the plaintiff or his son, the First Amendment protected them because they did not contain objectively verifiable facts about any individual and expressed only rhetorical hyperbole.⁶⁰ The court reasoned that the words “God hates,” “Thank God,” “Fag Troops,” and “Priests Rape Boys” were incapable of objective verification⁶¹ and that the signs’ references to God and terrorist attacks

54. *Id.* at 20.

55. *Snyder*, 580 F.3d at 222–26.

56. *Id.* at 222. The court noted that the district court’s post-trial opinion did not address the following four signs: “Don’t Pray for the USA,” “Thank God for IEDs,” “Priests Rape Boys,” and “God Hates Fags.” *Id.* at 222 n.18 (internal quotation marks omitted).

57. *Id.* at 222–23. The Fourth Circuit noted that the Supreme Court had not specifically addressed whether the Constitution protected nonmedia statements regarding issues of public concern that were “not provably false.” *Id.* at 219 n.13. The Fourth Circuit asserted, however, that any distinction between nonmedia defendants and media defendants is “unstable” and that the First Amendment equally protects both types of defendants on issues “of public concern that [are not] provably false.” *Id.*

58. *Id.* at 223 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 759 (1985)).

59. *Id.* The court noted that the signs “God Hates the USA/Thank God for 9/11” and “Don’t Pray for the USA” dealt with national concerns; the signs mentioning “fags,” “troops,” and “dead soldiers” referred to groups rather than to a specific individual because the nouns were plural; and the signs referring to the Pope and to priests addressed individuals clearly unrelated to the plaintiff and his son. *Id.* (internal quotation marks omitted).

60. *Id.*

61. *Id.* (internal quotation marks omitted).

amounted to “‘loose, figurative, or hyperbolic language’” not seriously perceived as factual.⁶²

Next, the court examined two specific signs: “You’re Going to Hell” and “God Hates You.”⁶³ The court held that the First Amendment protected these signs because they could “not reasonably be interpreted as stating actual facts about any individual.”⁶⁴ The court reasoned that although readers could potentially interpret the pronoun “you” to refer either to the plaintiff and his son or to a collective group, it did not matter to whom the assertions referred because neither assertion included “provable facts.”⁶⁵ Furthermore, it reasoned that the “context and tenor” of the signs communicated their lack of serious factual assertion: “A distasteful protest sign regarding hotly debated matters of public concern, such as homosexuality or religion, is not the medium through which a reasonable reader would expect a speaker to communicate objectively verifiable facts.”⁶⁶

Finally, the court examined the Web site epic and held that the First Amendment protected its rhetoric because “a reasonable reader would not understand the [speech] to assert actual facts about either [the plaintiff] or his son.”⁶⁷ The court reasoned that although the epic’s title, “The Burden of Marine Lance Cpl. Matthew A. Snyder,” could cause a reasonable reader to interpret the epic’s statements as assertions of fact about the plaintiff’s son, the Web site and other aspects of the epic negated such an interpretation because they connected the epic to the defendants’ general message and protests.⁶⁸ The epic’s subtitle, “The Visit of Westboro Baptist Church to Help the Inhabitants of Maryland Connect the Dots! This Epic Adventure Took Place on Friday, March 10, 2006,” and a photograph of the Maryland protest included immediately below the epic’s title connected its content to the defendants’ Maryland rhetoric.⁶⁹ And the epic’s specific language connected the death of the plaintiff’s son to the defendants’ protest activities:

God rose up Matthew for the very purpose of striking him down, so that God’s name might be declared throughout all the earth. He killed Matthew so that His servants would have an opportunity to preach His words to the U.S. Naval Academy at Annapolis, the Maryland

62. *Id.* (quoting *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 21 (1990)).

63. *Id.* at 224 (internal quotation marks omitted).

64. *Id.*

65. *Id.* The court noted that “[w]hether an individual is ‘Going to Hell’ or whether God approves of someone’s character could not possibly be subject to objective verification.” *Id.*

66. *Id.*

67. *Id.* at 226.

68. *Id.* at 224–25 (internal quotation marks omitted).

69. *Id.* at 224 (internal quotation marks omitted).

Legislature, and the whorehouse called St. John Catholic Church at Westminster where Matthew Snyder fulfilled his calling.⁷⁰

The court also reasoned that the context and general tenor of the epic indicated the assertions were rhetorical hyperbole: a recap of the Maryland protest provided the contextual background for the assertions, the church's Web site published the epic, and the piece contained "distasteful and offensive words, atypical capitalization, and exaggerated punctuation."⁷¹ All of these factors conveyed that the claims were irrational declarations rather than provable conclusions.⁷² Therefore, because the court found that a reasonable reader could not interpret the defendants' signs or Web site epic as stating actual facts about the plaintiff or his son, it held that the First Amendment protected the defendants' speech.⁷³

The concurrence in *Snyder* declined to consider the First Amendment issue addressed by the majority but concurred in the final judgment by holding that the jury lacked sufficient evidence to support its verdict.⁷⁴

First, the concurrence held that the jury lacked sufficient evidence to conclude that the defendants intruded on the plaintiff's right to seclusion.⁷⁵ It noted that "[u]nder Maryland law, an 'intrusion' occurs when there has been some act that interferes 'into a private place or the invasion of a private seclusion that the plaintiff has thrown about his person or affairs.'"⁷⁶ Furthermore, an intrusion implies "something in the nature of prying"⁷⁷ upon an individual when he is in a place unexposed to the public.⁷⁸ The concurrence reasoned that the defendants' funeral protest did not intrude upon the plaintiff's seclusion because it took place in a public area, was positioned "approximately 1,000 feet

70. *Id.* at 225 (internal quotation marks omitted).

71. *Id.*

72. *Id.*

73. *Id.* at 225–26.

74. *Id.* at 227 (Shedd, J., concurring). The majority did not consider the sufficiency of evidence argument because only an amicus brief raised the issue. *Id.* at 216 (majority opinion). The majority held that although the Supreme Court permits appellate consideration of issues raised only by amicus, doing so would not comport with Fourth Circuit precedent or the preference of other circuits. *Id.* at 216–17. In contrast, the concurrence held that not only did Supreme Court rulings permit it to consider issues raised only by amicus (and that Fifth Circuit precedents supported that position), but additional factors in this case compelled it to do so. *Id.* at 227–28 (Shedd, J., concurring). It specifically noted that the defendants had challenged the sufficiency of the evidence in its trial and post-trial motions, the plaintiff had already responded to the issues raised by the amicus, and the doctrine of constitutional avoidance required it to avoid ruling on a constitutional issue if it could dispose of the case on other grounds. *Id.* at 228.

75. *Id.* at 231. During trial, the district court instructed the jury that the elements of intrusion upon seclusion are the following: "(1) An intentional (2) intrusion or prying upon (3) something which is and is entitled to be private (4) in a manner which is highly offensive to a reasonable person." *Id.* at 228–29 (internal quotation marks omitted).

76. *Id.* at 229 (quoting *Furman v. Sheppard*, 744 A.2d 583, 586 (Md. Ct. Spec. App. 2000)).

77. *Id.* (quoting *Hollander v. Lubow*, 351 A.2d 421, 426 (Md. 1976)).

78. *See id.* (citing *Furman*, 744 A.2d at 587).

from the funeral,” and stopped during the funeral service; furthermore, the defendants never met the plaintiff, and the plaintiff could not see the protest.⁷⁹ It also reasoned that the television coverage of the defendants’ protest did not intrude on the plaintiff’s seclusion because it reported information that was already public.⁸⁰ Finally, it reasoned that the Web site epic did not intrude on the plaintiff’s seclusion because the defendants did not direct the epic at the plaintiff; rather, the plaintiff encountered the epic through an Internet search and his own choice to read the piece.⁸¹ Therefore, the concurrence held that the jury did not have sufficient evidence to support its conclusion that the defendants intruded on the plaintiff’s right to seclusion.⁸²

Secondly, the concurrence held that the jury lacked sufficient evidence to conclude that the defendants intentionally inflicted emotional distress on the plaintiff.⁸³ The plaintiff alleged that the defendants inflicted emotional distress on him because they focused their messages on his family, caused the rerouting of his son’s funeral, and interrupted his grieving process by causing him to worry that his daughters would see their protest.⁸⁴ In the concurrence’s view, intentional infliction of emotional distress under Maryland law is a tort that “‘is rarely viable, and is to be used sparingly and only for opprobrious behavior that includes truly outrageous conduct.’”⁸⁵ The concurrence held that although the defendants’ action may have been inappropriate, it was not sufficiently “extreme and outrageous” to support liability for intentional infliction of emotional distress.⁸⁶ The concurrence reasoned that the defendants’ protest complied with local regulations, took place in a public area, and did not disrupt the funeral service; thus, it did not rise to the level of outrageousness needed to recover under Maryland tort law.⁸⁷ Consequently, the concurrence held that the jury lacked sufficient evidence to support its findings that the defendants intruded on

79. *Id.* at 230.

80. *Id.* at 230 n.1 (citing *Hollander*, 351 A.2d at 426).

81. *Id.* at 231.

82. *Id.*

83. *Id.* at 232. During trial, the district court instructed the jury that the elements for intentional infliction of emotional distress are the following: “(1) the . . . conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) the conduct caused emotional distress to [the plaintiff]; and (4) the emotional distress was severe.” *Id.* at 231.

84. *Id.* at 232.

85. *Id.* at 231 (quoting *Bagwell v. Peninsula Reg’l Med. Ctr.*, 665 A.2d 297, 319 (Md. Ct. Spec. App. 1995)).

86. *Id.* at 232. To find conduct “extreme and outrageous,” the conduct must be “‘so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.’” *Id.* at 231 (quoting *Pemberton v. Bethlehem Steel Corp.*, 502 A.2d 1101, 1115 (Md. Ct. Spec. App. 1986)).

87. *Id.* at 232.

the plaintiff's right to seclusion or intentionally inflicted emotional distress on him.⁸⁸

In *Snyder*, the Fourth Circuit rooted its holding in firmly established precedent; thus, the decision has relatively few implications in terms of creating new constitutional protection for speech. However, the decision's primary effect of reaffirming existing protections should not be undervalued. Although the protections provided by the Free Speech Clause of the Constitution are foundational to American democracy, decisions like *Snyder* serve to ensure their continued importance in a world where increased diversity leads to a multiplication of "marketplace" ideas.

Naturally, the facts in *Snyder* lead to concerns about the privacy protection afforded to distinctly personal settings such as funerals.⁸⁹ Such concern is well-founded given the frequency with which Westboro Baptist Church members visit funerals to proclaim their message.⁹⁰ Furthermore, the Fourth Circuit's holding may empower individuals with other platforms to choose funerals as a venue for asserting their opinions. The Fourth Circuit's decision correctly notes that governmental authorities can protect privacy during times of bereavement by enacting reasonable time, manner, and place restrictions that are content-neutral.⁹¹ Indeed, the federal government has enacted the Respect for America's Fallen Heroes Act⁹² establishing guidelines for protests of military funerals at national cemeteries, and at least forty-one states have passed legislation restricting funeral protests.⁹³ However, as legal scholarship and recent court decisions indicate, drafting constitutionally appropriate funeral protest legislation is difficult.⁹⁴

Regardless of the difficulty that maintaining the Constitution's free speech protections imposes on those seeking to preserve the privacy rights of the

88. *Id.* The concurrence also argued that the defendants could not be liable for civil conspiracy because the "unlawful activity" required to support recovery of damages for civil conspiracy was a finding of liability on the other claims. *Id.* n.3.

89. *See id.* at 226; Brief for Thomas Jefferson Center for the Protection of Free Expression as Amicus Curiae Supporting Appellants at 30–31, *Snyder*, 580 F.3d 206 (4th Cir. 2009) (No. 08-1026), 2008 WL 2593816; Kara Beil, Note, *Funeral Protest Bans: Do They Kill Speech or Resurrect Respect for the Dead?*, 42 VAL. U. L. REV. 503, 541 (2008).

90. *See Snyder*, 580 F.3d at 211.

91. *See id.* at 226.

92. Respect for America's Fallen Heroes Act, Pub. L. No. 109-228, 120 Stat. 387 (codified as amended at 18 U.S.C. § 1387, 38 U.S.C. § 2413 (2006)).

93. DAVID L. HUDSON JR., FIRST AMENDMENT CTR., FUNERAL PROTESTS (2009), http://www.firstamendmentcenter.org/assembly/topic.aspx?topic=funeral_protests.

94. *See Phelps-Roper v. Nixon*, 509 F.3d 480 (8th Cir. 2007); *Phelps-Roper v. Taft*, 523 F. Supp. 2d 612 (N.D. Ohio 2007), *aff'd sub nom. Phelps-Roper v. Strickland*, 539 F.3d 356 (6th Cir. 2008); *McQueary v. Stumbo*, 453 F. Supp. 2d 975 (E.D. Ky. 2006); Stephen R. McAllister, *Funeral Picketing Laws and Free Speech*, 55 U. KAN. L. REV. 575, 608–12 (2007); Njeri Mathis Rutledge, *A Time to Mourn: Balancing the Right of Free Speech Against the Right of Privacy in Funeral Picketing*, 67 MD. L. REV. 295, 312–28 (2008); Beil, *supra* note 89, at 525–41; Lauren M. Miller, Comment, *A Funeral for Free Speech? Examining the Constitutionality of Funeral Picketing Acts*, 44 HOUS. L. REV. 1097, 1116–30 (2007).

grieving, courts should continue to diligently protect each individual's right to speak freely. Obviously, one would not choose the defendants' rhetoric as endearing speech with which to champion the ideals of free expression. Yet, radical expression and the cause of the minority are mainstays of the Free Speech Clause.⁹⁵ Holding that the "distasteful and repugnant"⁹⁶ nature of the defendants' speech places it outside the protections of the First Amendment might provide temporary solace to the grieving, but it would ultimately restrict speech to expression that no listener would find offensive. Most importantly, it would inhibit the pursuit of truth.⁹⁷ Although accepting the defendants' speech as constitutionally protected may be difficult, doing so fosters the "free trade in ideas" essential to the success of America's marketplace.⁹⁸

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95. See *Roth v. United States*, 354 U.S. 476, 484 (1957); *Stromberg v. California*, 283 U.S. 359, 369 (1931).

96. *Snyder*, 580 F.3d at 226.

97. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (arguing "that the best test of truth" is for the government to allow speech to gain acceptance or be rejected in the free market of ideas).

98. *Id.*

